

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





**ORIGINAL**

**77-1073**

**United States Court of Appeals  
For the Second Circuit**

UNITED STATES OF AMERICA,

*Appellee,*

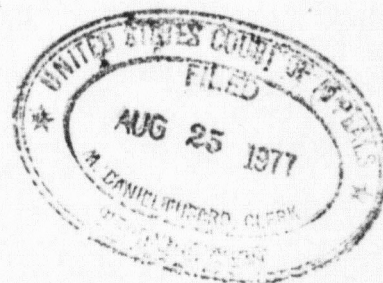
-against-

ANTHONY SCIOTTO,

*Appellant.*

*On Appeal From The United States District Court  
For The Eastern District Of New York*

**APPELLANT'S BRIEF**



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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|---------------------------|---|-----------|
|                           | : |           |
| UNITED STATES OF AMERICA, | : |           |
|                           | : |           |
| Appellee,                 | : | 77 - 1072 |
|                           | : |           |
| against                   | : | 77 - 1073 |
|                           | : |           |
| ANTHONY SCIOTTO,          | : |           |
|                           | : |           |
| Appellant.                | : |           |
|                           | : |           |

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered as to Appellant Sciotto on February 4, 1977, after a jury trial before Hon. Edward R. Neaher, U.S.D.J.

Appellant was convicted of violating Title 21 U.S.C Section 841 (a)(1) and Title 18 U.S.C. Section 2 and sentenced to a term of imprisonment of eighteen months and two years special parole.



### STATEMENT OF FACTS

The Government's case was established through the testimony of Joseph Grande who testified as follows:

On May 18, 1976, Anthony Sciotto called Grande at his laundromat at 439 Kings Highway, Brooklyn, New York, and told him that he had approximately 350,000 headache pills for sale. Grande requested a sample and delivery of all of the pills was made on May 19, 1976. (Transcript page 40,46).

An examination of the cartons revealed phenobarbital in pill form. Sciotto stated that he did not know what was in the cartons and would not have brought them if he had been aware of the contents. (T. pg. 49-50).

Grande immediately rejected the pills and demanded that they be removed. Sciotto went to a pay telephone to call 'the guys' and then left.

Later in the day Sciotto called Grande to tell him that 'the guys' wanted \$500. for the pills and that Grande should help him out. Grande refused to pay anything and again demanded that the pills be removed and threatened to "dump them" if they were not picked up. (T. pg. 51-2).

On May 20, 1976, Grande began loading the cartons into a borrowed car. (T. pg. 52). Grande was going to dump the pills. (T. pg. 122). While loading the pills Grande was

arrested. All of the pills were recovered and Grande agreed to cooperate. (T. pg. 53)

Grande called Sciotto to set up a meeting at Avenue N and Nostrand Avenue for 1:40 P.M. on May 20, 1976. Agents of the Drug Enforcement Administration recorded the call with Grande's consent.

Grande and D.E.A. agent McKinley were in Grande's laundromat at approximately 1:40 P.M. when Sciotto walked in followed by two men. The two men were unknown to Grande. (T. pg 66)

Sciotto said he had brought the fellows that came for the money. Those two men were at the entrance of the store approximately sixty feet from Sciotto and Grande. (T. pg.32) Grande asked Sciotto to give him five minutes, and Sciotto left with the two men. (T. pg. 67-8)

Grande identified the two men as William Rothaar and Philip Arcuri.

Grande left the laundromat and met the three men in the street. Sciotto introduced Grande to Rothaar and Arcuri for the first time and the four men walked to the laundromat office. (T.pg. 70-1)

Grande introduced the three men to agent McKinley. All of them shook hands. When Grande said this is the gentleman who offered two cents Philip Arcuri shook his head from side to side and walked out. "None of them said a word".(T.pg.72)

Grande asked Arcuri if he wanted to talk to McKinley and Arcuri said "let him talk to him" - referring to Sciotto.



(T. pg. 74) Rothaar who had said nothing walked out without saying or doing anything. (T.pg.140)

As Rothaar and Arcuri were leaving all of the men were arrested.

Agents McKinley, Guillen, Baker and Cavuto, all of whom had been in the area of the laundromat, testified that they did not know how Arcuri, Sciotto and Rothaar got to the laundromat. They never saw them arrive in any car and did not observe a 1972 white Lincoln Continental in the area at the time of arrest. No defendant possessed the keys to any such car.

After the arrest Grande returned to the laundromat and identified a 1972 white Continental parked across the street as the car he had seen Sciotto drive at the time of the delivery. A search of the glove compartment revealed a bottle of pills similiar to the ones in the cartons, and personal papers with Philip Arcuri's name on them. Arcuri denied ownership of the vehicle. All items siezed in the car were admitted into evidence over objection.

The evidence including the pills were admitted subject to connection, and as evidence of the conspiracy.

The conspiracy count was dismissed by the Court and only one count was submitted to the jury. Each defendant was convicted of violating title 21 U.S.C. Section 841 (a)(1), and Title 18 U.S.C. Section 2.

Anthony Sciotto was sentenced on February 4, 1977,

to eighteen months in prison and two years special parole.

(Neaher, J.)



STATEMENT OF ISSUES

1. Was there sufficient evidence to establish the statutory criminal knowledge or intent?

POINT ONE

THERE WAS INSUFFICIENT EVIDENCE  
TO ESTABLISH THE REQUISITE  
CRIMINAL INTENT.

The evidence against Anthony Sciotto does not sufficiently establish the statutorily mandated intent to commit the offense charged. The charge against the defendant was that he possessed phenobarbital with intent to distribute it.

The testimony of Grande at transcript pages 49-50 clearly establishes that Sciotto did not know what was in the cartons he delivered to Grande's store. Grande stated at transcript page 49, line 14:

"A. When Tony came in and saw what kind of pills they were, he said to me that if he knew they were like this, he wouldn't have brought them."

At transcript page 50, line 1, Grande testified:

"A. Yes. When he saw what it was, he said, 'If I knew it was this, I wouldn't have brought it to you.'"

And at line 13 he stated:

"A. He says, 'They want four cents a piece for them.' I said, 'What kind of pills are they?' And he didn't know at the time until we saw what they were."

Upon learning what was contained in the cartons, Grande immediately told Sciotto to take them away. Sciotto made a telephone call and left. The next contact was made by Sciotto calling Grande. Grande stated the nature of the conversation at transcript page 51, line 7:



"A. Yes he called me later, in the afternoon, and told me that the guys wanted five hundred dollars and I told him I didn't want these pills and he asked me to get him off the hook, that he's stuck (emphasis supplied) and he put someone on the phone to ask me for the five hundred dollars. I told him I wouldn't give him five cents, to come and get these things out of here and hung up on him."

Grande was arrested in possession of the cartons early the next day as he was loading them into a car to take the cartons to the dump. Interestingly, Sciotto never again talks about pills, but only about the money that he is attempting to collect.

Factually no intent or knowledge can be imputed to Sciotto until he opens the cartons. Prior to that time he did not know what was contained in the cartons. After Grande says Sciotto told him he wouldn't have brought the cartons if he had known the contents Sciotto makes no attempt to retrieve the pills.

In United States v Byrd 352 F2d 570 (2 cir.1965) this Court held that it is necessary to determine whether a person was apprised of all of the facts before he may be held criminally liable for an offense requiring knowledge. This Court stated at page 572 that:

"...A finding that one acts knowingly presupposes that he was apprised of all of the facts which constitute the offense.

"Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all that

is meant by the mens rea, the 'criminal intent', necessary to guild....."

United States v Crimmins, 123 F2d 271, 272  
(2 cir. 1941)."

Sciotto did not know that he was in possession of a controlled substance and so did not possess knowledge of all of the facts which would make his conduct criminal.

The language in United States v DiBrizzi 393 F2d 642 644 (2 cir. 1968) to the effect that:

"direct proof that acts are done unlawfully and wilfully is not always necessary for such may often be inferred from the very fact that the acts constituting the crime have been committed."

cannot be controlling since the very fact which would constitute the acts necessary to the commission of the crime could not be established; to wit, knowledge.

The United States Supreme Court in Leary v United States 395 US 6, 46 n 93, 23 2 Ed 2d 57 (1969) adopted the Model Penal Code definition of knowledge. The Court stated:

"...We have employed as a general guide the definition of "knowledge" which appears in the Proposed Official Draft of the Model Penal Code, at 27 (1962). The Code provides:

"When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist. " "

This Court in a more recent decision has held that the standard to be applied in determining knowledge is one which must embrace the concept of mens rea. In United States



v Bright 517 F 2d 584, at 586-587 (2 cir,1975) the Court stated:

"In all cases involving the receipt or possession of stolen goods, the definition of the requisite "knowledge" that the goods were stolen, required for a conviction makes the difference between guilt and innocence. The test is not a technical one requiring a grudging adherence to some abstract standard. The standard should always embrace the ultimate concept of mens rea. A negligent or a foolish person is not a criminal when criminal intent is an ingredient."

Sciotto was never in possession of what he knew to be a controlled substance at a time when he intended to distribute such a controlled substance. Once Sciotto gave the cartons to Grande he never again sought their return. Instead of negotiating for the return of the pills or for a price per pill, Sciotto asked Grande for Five Hundred Dollars to get him off the hook. Five Hundred Dollars would represent approximately .0014¢ per pill. It is not reasonable to assume that the Five Hundred Dollars represents a price of the pills when the price per pill is viewed with Grande's statement that he would not pay five cents for all of them and that he intended and was in fact about to dump the pills.

It is a more reasonable inference that Sciotto was attempting to get the money for himself using the pretext that he was in trouble and needed to get off the hook. Taken as a whole the evidence against Sciotto was insufficient as it pertains to the element of intent or knowledge.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD  
BE REVERSED AND THE INDICTMENT  
DISMISSED.

Respectfully submitted

Marvin Preminger  
Assigned Counsel



AFFIDAVIT OF PERSONAL SERVICE

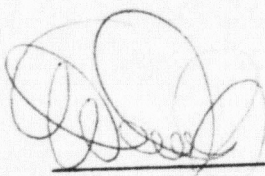
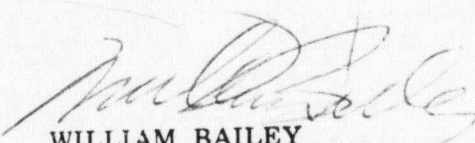
STATE OF NEW YORK  
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of August, 19 77 at No. 225 Cadman Plaza East, Brooklyn, NY

deponent served the within Brief  
upon U.S. Atty., East. Dist. of NY

the Appellee herein, by delivering 3 true  
copy(ies) thereof to him personally. Deponent knew the person so  
served to be the person mentioned and described in said papers as the  
Appellee therein.

Sworn to before me this  
11 day of August 1977.

  
\_\_\_\_\_  
Edward Bailey  
WILLIAM BAILEY  
Notary Public, State of New York  
No. 43-0132945  
Qualified in Richmond County  
Commission Expires March 30, 1978